IN THE HIGH COURT OF NEW ZEALAND 22/7 AP 112/94
AUCKLAND REGISTRY

1034 LOW PRIORITY

BETWEEN HIKU

Appellant

AND NEW ZEALAND POLICE

Respondent

Hearing: 20 June 1994

Counsel: P. O'Sullivan for Appellant
H.B. Leabourn for Respondent

Judgment: 20 June 1994

ORAL JUDGMENT OF FISHER J

Solicitors:

P. O'Sullivan, Barrister for Appellant
Meredith Connell & Co., DX 63, Auckland for Respondent

This is an appeal against a conviction in the District Court at Pukekohe on 17 May 1994. The appellant was found guilty on a charge of receiving a stolen vehicle. He was convicted and discharged.

The appellant was found in possession of a vehicle which the evidence plainly showed to be a stolen one. Apart from the witness who proved the theft or unlawful taking of the vehicle, evidence was given by two police officers. By agreement the evidence was limited to the production of signed briefs. Sergeant Newton gave evidence that when the appellant was asked for an explanation for the fact that he was driving a stolen car the appellant responded that he had "purchased the car from a 28-30 year old pakeha for $400" at a designated house. The other police officer, Constable Peterson, indicated that the house nominated by the appellant had been occupied by a "Glenda Jamieson". He gave no other relevant and admissible evidence.

The District Court Judge considered that there was a prosecution case sufficient to place upon the appellant the evidentiary burden of giving evidence to avoid an adverse inference in terms of ***Trompert v Police*** (1984) 1 CRNZ 324, CA. Personally I regard the principle espoused in the ***Trompert*** case as a difficult, and perhaps even a dangerous, one unless applied with special care. The danger is that it will all too readily be converted into the proposition that a defendant's failure to give evidence in circumstances of suspicion can be converted into a positive brick with which to build the prosecution wall. The true explanation of the ***Trompert*** case, I think, is that one ought to disregard any failure by the defendant to give evidence unless and until one has first decided that the prosecution has made out a prima facie case. It is only when there is a prima facie prosecution case sufficient to support a conviction in its essential ingredients that one can turn to the possibility of drawing an adverse inference from the defendant's failure to provide an innocent explanation for seemingly incriminating circumstances. If the prosecution does need to go that far before the ***Trompert*** principle can be invoked one might ask what the point of the principle is in the first place. As I understand it, its sole point is that when it comes to the weight to be attached to the prosecution evidence, as distinct from some logical evidentiary foundation for all the ingredients essential for conviction, then one can take into account the absence of innocent explanation. That distinction comes dangerously close to sophistry but I would presume it to mean this. One must first be able to extract from the prosecution evidence all the ingredients which could logically support a conviction. Only if that threshold has been satisfied, and the Court is then dealing with questions of weight and degree, can the ***Trompert*** principle be invoked.

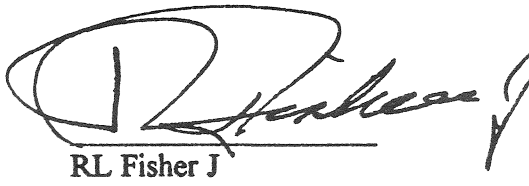
In the present case the foundation for the prosecution had to lie not merely in the fact that the car had been stolen. There also had to be other suspicious circumstances surrounding the appellant's possession of it or in the comparison between the known circumstances and the appellant's explanation, or in the inherently suspicious nature of his explanation.

I can see nothing inherently suspicious in the simple statement that the appellant had purchased the car for $400 from a 28-30 year old pakeha some two or three days before apprehension. Nor is there anything inherently suspicious in the price - the independent evidence was that the car was valued by or on behalf of the owner at $500. Mr Leabourn suggested that the absence of an exchange of names and addresses between the parties to the alleged sale transaction, and the failure to secure a receipt and ownership papers, puts the explanation into the suspicious category. Certainly I would think that, given the surrounding circumstances, very little would be needed to convert the explanation into a suspicious one, and therefore a basis for conviction. However, the Sergeant does not say that the explanation that he has recounted represented everything that the appellant had told the sergeant, still less that the way in which the appellant gave that explanation left the implication that there had been no exchange of documentation, names or addresses. I would not be surprised if, given oral evidence from the Sergeant, that would be the proper inference but one could not draw it from the brief as it presently stands. Similarly as to the evidence given by Constable Peterson in his written statement, there is nothing to indicate that Glenda Jamieson was not a 28-30 year old pakeha or that anything else was suspicious or inconsistent with the explanation. One must of course disregard the hearsay evidence that Glenda Jamieson, and the people occupying the house nearby where the appellant often resided, denied all knowledge of the car.

I do not think that the prosecution advanced a prima facie case which would then justify reliance upon the absence of an exculpatory statement from the appellant. It follows that the appeal must be allowed.

I have now heard from counsel on the subject of a rehearing. It seems to me that if the prosecution were to present its evidence orally there is every likelihood that a prima facie case would be achieved. The prosecution would presumably call Sergeant Newton and Constable Peterson, probably the Rawiri's and, if available, Glenda Jamieson. Notwithstanding Mr O'Sullivan's submissions to the contrary, I think that justice requires a rehearing to allow the prosecution that opportunity.

In the circumstances the appeal is allowed and the conviction quashed. However, I direct that the prosecution be reheard as to the receiving charge. The earlier discharges with respect to theft and unlawful taking will stand.



RL Fisher J